No. 3545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY (a corporation),

Plaintiff in Error,

vs.

SHERWOOD & SHERWOOD COMMERCIAL CO. (a corporation),

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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This action was commenced in the District Court by plaintiff in error to recover the sum of $5272.75, which it claimed as damages for breach of a contract for the sale and delivery of merchandise made by it with the defendant. The action was tried before a court sitting with a jury and at the conclusion of plaintiff's case, a motion for non-suit, on behalf of defendant, was granted, and judgment accordingly entered in its favor.

The following assignments of error are relied upon by plaintiff:

(1) That the District Court erred in granting the motion for non-suit, to which exception was taken at the trial.

(2) That the decision of the District Court is against law.

(3) That the decision of the District Court is contrary to the evidence and law applicable to the case.

Each of these assignments involves the same question, namely, as to whether the granting of the non-suit was proper.

The facts of this case, as disclosed by the record, are as follows:

On March 14, 1918, S. L. Hellman, an officer and representative of plaintiff in error, had a conversation over the telephone with Harry Lieb, the managing head of the defendant corporation. Hellman testified upon this subject as follows:

> "I purchased two hundred barrels of Old Taylor Whiskey on advice from the Cincinnati office (of plaintiff corporation). I purchased one hundred barrels of the 'fall of 1913' at $1.32½ and 100 barrels of the 'spring of 1914' at $1.35, less all charges to date and two per cent commission. I was acting for the Cincinnati Distributing Co. I purchased this whiskey at $1.32½ and $1.35 per proof gallon, as shown by the warehouse receipt, which always has marked thereon the number of gallons of each barrel purchased.
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> * * * * * * *
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> I called Mr. Lieb up over the telephone at 4 o'clock. He told me he had concluded to let

me have the goods at $1.35 per proof gallon, less charges and commission. I then informed him that I would not purchase it at that price because I had purchased goods of similar description with a difference of 5 cents per gallon between the 13 and 15 ages, but that in this instance I was willing to take them at a difference of 2½ cents and offered him $1.32½ for the 'fall of 1913' and $1.35 for the 'spring of 1914.' After a moment's hesitation, he said 'very well, I will take it,' and I said immediately 'I wish you would wire confirmation to our Cincinnati office,' and he replied, saying 'I am ready to leave the office. There is some one waiting for me and I cannot take the time. Will you make this confirmation yourself for me?' * * * After this conversation, I immediately wired confirmation to the Cincinnati Distributing Company of this lot of whiskey."

The telegram on confirmation referred to by the witness is as follows (plaintiff's Exhibit No. 3):

"Los Angeles, Calif., Mar. 14, 1918.
The Cincinnati Distributing Co.,
607 Traction Building,
Cincinnati, Ohio.

Bought ninety-nine each fall thirteen spring fourteen Taylor one thirty-two half thirty-five less commission.

(Signed) S. L. Hellman."

With reference to the fact that the wire of confirmation called for only one hundred and ninety-eight barrels, instead of two hundred, the witness testified:

"There was one barrel short in each of the lots by reason of the fact that there was an excessive outage in one barrel of the 13's and one barrel of the 14's. This reduced the total amount to 198 barrels."

Mr. Hellman's testimony with reference to the circumstances surrounding the placing of the order is corroborated by Samuel Davis, though, for the purposes of this appeal, such corroboration is unnecessary, as Mr. Hellman's testimony stands uncontradicted upon the record. The rule in cases where a non-suit is granted, is that if there is any testimony to support the allegations of the complaint or to justify a judgment in favor of plaintiff, the judgment must be reversed.

Mr. Davis, a traveling salesman, was in the office of Sherwood & Sherwood at the time of the telephone conversation between Mr. Lieb and Mr. Hellman. He stated that

> "I heard Mr. Lieb say to Mr. Hellman that he could consider the sale made at $1.35 and that he was leaving the office to go downtown."

When questioned as to how he knew that Mr. Lieb was talking to Mr. Hellman, he testified that Mr. Lieb

> "stated to me right after the conclusion of the conversation that he was talking to a friend of mine and I asked him who and he said Sid Hellman."

Upon receipt of the telegram of Mr. Hellman (plaintiff's Exhibit No. 3), the home office of the plaintiff corporation immediately sold the 198 barrels of whiskey to the Loma Grand Company at $1.40 per proof gallon. The president of the company testified:

> "Upon receipt of the telegram from Mr. Hellman (Plaintiff's Exhibit No. 3) I personally sold the Old Taylor Whiskey to the Loma Grand Company, Chicago, at $1.40 per proof gallon. The sale to the Loma Grand Company was made over the telephone on March 14, 1918."

Two weeks after this transaction was completed, plaintiff, having received no word from Mr. Hellman or Sherwood & Sherwood with reference to this whiskey, telegraphed Mr. Hellman, who was then in San Francisco, to ascertain why shipment of the same had been delayed. Mr. Hellman immediately communicated with Mr. Lieb, who then advised him that he would not deliver the whiskey. Upon receipt of this information, Mr. Hellman communicated the same to the home office of plaintiff, which information reached plaintiff on April 1, 1918, upon which date it was compelled to and did purchase in the open market 198 barrels of Old Taylor Whiskey in order to fulfill its obligation to the Loma Grand Company. This whiskey was purchased at $1.85 per proof gallon. The amount which plaintiff sued for in this action was the difference between the price paid by it for the whiskey on April 1st, when it received word of the repudiation of the contract by Sherwood & Sherwood, and the contract price of $1.32½ and $1.35 per proof gallon.

The ground upon which the trial court granted the motion for non-suit was that the contract between the parties in this action was one which by the statute of frauds was required to be in writing

and that there was no memorandum of the transaction sufficient to take it out of the operation of the statute.

The position of the plaintiff in error with reference to the applicability of the statute of frauds is, that while it is conceded that the contract in question is one for the sale of merchandise over the value of $200 and is therefore within the operation of the statute, the telegram which is above set forth, is a sufficient compliance with the requirements of the statute. The testimony in this case is that Mr. Hellman was authorized by Mr. Lieb to send the telegram and for that purpose, he was the agent of defendant in error and the telegram sufficiently sets forth the transaction to take it out of the operation of the statute of frauds.

It will probably be contended by defendant that the telegram sent by Mr. Hellman to the Cincinnati Distributing Company announcing the purchase of the whiskey is insufficient as a memorandum to take the case out of the statute of frauds, for the reason that the telegram does not specify from whom the purchase was made, but in this connection, we desire to direct the Court's attention to plaintiff's Exhibits 1 and 2. The first of these exhibits was a telegram from Hellman to the Cincinnati Distributing Company announcing that Sherwood would sell the whiskey, and Exhibit 2 is a reply from the Cincinnati Distributing Company directing Hellman to purchase the whiskey from Sherwood. These three telegrams, which were written

on March 13th and March 14, 1918, taken together, conclusively indicate that the final message from Hellman referred to the whiskey of defendant. The telegram, therefore, contains all of the essential requirements of a memorandum sufficient to take the present case out of the operation of the statute of frauds.

This position is sustained in the case of *Brewer v. Horst,* 127 Cal. 643, wherein it was stated:

> "The court is permitted to interpret the memorandum by the light of all the circumstances under which it was made; and if when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used. * * * Parol evidence is always admissible to explain the surrounding circumstances and situation and relations of the parties at and immediately before the execution of the contract in order to connect the description with the only thing intended and thereby to identify the subject matter and to explain all terms and phrases used in a local or special sense."

But, assuming that this Court should determine that the memorandum is insufficient to take the contract out of the operation of the statute of frauds, plaintiff in error contends that defendant is estopped from asserting the statute of frauds as a defense to this action.

A very complete discussion of the circumstances under which a party defendant to an action may be held estopped to assert the statute of frauds as a defense to an action upon a contract is contained in *Seymour v. Oelrichs,* 157 Cal. 782. The right to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing fraud, is in that case held to be beyond dispute. The Court said:

> "It is based upon the principle thoroughly established in equity and applying in every transaction where the statute is involved, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting or aiding a party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme."

The following quotation from *Glass v. Hulbert,* 102 Mass. 24, is set forth and approved:

> "The fraud most commonly treated as taking an agreement out of the statute of frauds, is that which consists in setting up the statute against its enforcement after the other party has been induced to make expenditures or a change of situation in regard to the subject matter of the agreement or upon the supposition that it was to be carried into execution and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds."

The general principle involved in the foregoing is expressed in *Dickerson v. Colgrove,* 100 U. S. 580, as follows:

> "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both."

Plaintiff in error contends that this principle is applicable to the case at bar. Assuming, as we must, upon this appeal that the testimony of Mr. Hellman is correct that Mr. Lieb orally advised him that he would sell and deliver 198 barrels of Old Taylor whiskey at from $1.32½ to $1.35 per proof gallon, the resale of this whiskey by plaintiff in error upon receiving information of the purchase of the same, was such a change of position on its part as is contemplated by the statute. Relying upon the assurance of Mr. Lieb that the whiskey would be delivered forthwith, it obligated itself to deliver this whiskey to a third party and was in fact compelled, upon the repudiation of the contract by defendant, to purchase the same in the open market at an advanced price and a loss to itself of over $5000. Under these circumstances, to permit defendant to assert the statute of frauds as a defense to the action upon the contract, would constitute a fraud upon plaintiff, the very thing which the statute of frauds was aimed to prevent. It is clear that plaintiff in error would not have contracted to sell this

whiskey to the Loma Grand Company of Chicago, were it not for the assurance of Mr. Lieb that this whiskey would be delivered to it by defendant in error. We may well ask under these circumstances, as did the Court in the case of *Seymour v. Oelrichs,* supra:

> "Is it permissible to them in view of the well settled principle of law stated, to so repudiate the contract by interposing the fact that it has not been reduced to writing as promised, as a defense to this action?"

It is not necessary that actual fraud on the part of defendant in error be shown, nor that it agreed to deliver the whiskey with intent to interpose the statute of frauds as a defense, in the event that plaintiff in error attempted to enforce the oral obligation. All that is necessary, as was said in *Anderson v. Hubble,* 93 Ind. 570, is that

> "the person against whom the estoppel is asserted, must by his silence or his representation have created a belief of the existence of a state of facts which it would be unconscionable to deny. * * * All that is meant in the expression that an estoppel must possess an element of fraud, is that the case must be one in which circumstances and conduct would render it a fraud for the party to deny what he had previously induced or suffered another to believe and take action upon."

It is respectfully submitted that defendant in error by its direct representation that it would sell and deliver to plaintiff in error one hundred and ninety-eight barrels of Old Taylor Whiskey at

prices ranging from $1.32½ to $1.35 per proof gallon, induced plaintiff in error to believe that it intended to deliver that whiskey and that plaintiff in error in good faith and relying upon this representation, resold the same and was compelled by reason of the subsequent repudiation of the contract on the part of defendant in error, to purchase a sufficient quantity of whiskey in the open market to fulfill its obligation, to its detriment and loss.

For the reasons herein expressed, we respectfully submit that the judgment of non-suit was erroneously granted and that the case should be remanded for a new trial, so that the issue as to whether or not Mr. Lieb did represent to plaintiff in error that his company would sell to plaintiff the whiskey in controversy, be determined and resolved.

Dated, San Francisco,
October 11, 1920.

Respectfully submitted,
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